No. 91-2051

In The
Supreme Court of the United States

October Term, 1992

STATE OF SOUTH DAKOTA IN ITS OWN BEHALF, AND AS PARENS PATRIAE,

Petitioner,

v.

GREGG BOURLAND, PERSONALLY AND AS CHAIRMAN OF THE CHEYENNE RIVER SIOUX TRIBE AND DENNIS ROUSSEAU, PERSONALLY AND AS DIRECTOR OF CHEYENNE RIVER SIOUX TRIBE GAME, FISH, AND PARKS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATES OF MONTANA, ALABAMA, CALIFORNIA, NORTH DAKOTA, UTAH AND WASHINGTON IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The States of Montana, Alabama, California, North Dakota, Utah and Washington, through their respective Attorneys General, respectfully submit a brief *amicus curiae* pursuant to S. Ct. R. 37.2 in support of the petition for writ of certiorari.

INTEREST OF *AMICI CURIAE*

Each State appearing as an *amicus curiae* has one or more Indian reservations within its boundaries. These reservations were created initially as areas where the affected tribe's members would have exclusive occupancy rights. Subsequent federal legislation, however, has eliminated that exclusivity in most instances. It is thus quite common for substantial amounts of reservation land to be owned not only by nonmembers but also by federal, state and local governments.

The complex land ownership and demographic patterns now characterizing many reservations raise difficult questions covering the extent to which tribes may exercise regulatory authority over the use of those lands by nonmembers. This Court has directly addressed this issue in two decisions: *Montana v. United States*, 450 U.S. 544 (1981), and *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408 (1989). These decisions establish that tribes have little or no regulatory authority over the activity of nonmembers on nonmember-owned lands absent consent and suggest no principled basis for reaching a contrary conclusion with respect to nonmember activity on land owned by nontribal governmental entities. The Court of Appeals below nevertheless elected not to apply the reasoning of either *Montana* or *Brendale* to resolve the issue whether the Cheyenne River Sioux Tribe

possesses the authority to regulate non-Indian hunting and fishing on tribal lands taken by the United States in connection with carrying out the Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887. The court instead implied a right to regulate non-Indian hunting and fishing under the territorial exclusivity provision of the Fort Laramie Treaty of April 29, 1868, 15 Stat. 635 (1869), and applied the rule of construction that treaty rights should not be deemed abrogated unless the intent to abrogate is manifest in the statute or associated legislative history. It found no abrogation because the involved taking statute, the Cheyenne River Act, Pub. L. No. 83-776, 68 Stat. 1191 (1954), was not animated by an intent to destroy tribal government -- unlike the allotment-era statutes pursuant to which the nonmember lands in *Montana* were removed from tribal status. *South Dakota v. Bourland*, 949 F.2d 984, 993 (8th Cir. 1991) (App. A-36). The Court of Appeals' decision as to the tribal lands taken under the Cheyenne River Act thus presents important questions concerning the scope of regulatory rights conferred under treaties or statutes with territorial exclusivity provisions and the proper analytical standards for determining whether those rights have been diminished or eliminated by later legislation. With respect to nontribal lands taken to carry out the Flood Control Act's purposes, the court remanded for further factfinding whether one of the exceptions identified in *Montana* to the general rule that tribes lack inherent regulatory authority over nonmembers was present. The remand order, if its merits are eventually deemed necessary to be addressed, raises the question whether, in light of *Brendale*, a tribe may ever exercise inherent regulatory jurisdiction over non-Indian hunting and fishing activity on nontribal lands.

The ramifications of the Court of Appeals' analysis are broad, since its reasoning is applicable to the full range of regulatory issues which may arise on governmentally-

owned property within Indian reservations. This reasoning, if followed by other courts, would also likely result, as it will almost certainly here, in even more confusion concerning the scope of tribal regulatory authority with respect to nonmembers. The lower court's decision presents a valuable opportunity to clarify those principles controlling determination of federally-conferred and inherent tribal regulatory authority -- clarification which the *amici* States believe is essential to avoid highly deleterious, ever-increasing jurisdictional conflicts between state and tribal governments.

SUMMARY OF THE ARGUMENT

A tribal right to regulate can have one of two sources: positive federal law or a tribe's retained, inherent authority. The Court of Appeals implied from the Fort Laramie Treaty of April 29, 1868, 15 Stat. 635 (1869), a right on behalf of the Cheyenne River Sioux Tribe to regulate non-Indian reservation hunting and fishing. Because the treaty did not expressly provide such a right, a substantial question exists whether any regulatory authority exists within the Tribe other than that emanating from its inherent powers. This question was discussed, but not squarely answered, in *Montana v. United States*, 450 U.S. 544 (1981), and should now be resolved.

Even if the Court of Appeals properly implied a grant of tribal regulatory authority from the Fort Laramie Treaty, that authority could emanate only from the Tribe's territorial exclusivity under the Treaty with respect to reservation lands. The Cheyenne River Act, Pub. L. No. 83-776, 68 Stat. 1191 (1954), however, unambiguously effected a cession of all real property ownership rights, except those relating to mineral estates, to the United

States for the purpose of creating a reservoir and adjacent shoreline to which the federal government, not the Tribe, would control access by nonmembers. Under these circumstances, the Court of Appeals' conclusion that a treaty-secured power to regulate non-Indian hunting and fishing continues within the area taken under the Cheyenne River Act effectively allows an implied right to survive the demise of the entitlement from which the right is derived. This conclusion draws no support from *Montana* and has significant consequences for the orderly regulation of government-owned lands within Indian reservations.

Determining the scope of inherent tribal authority requires analyzing the viability of the two-pronged *Montana* test in light of *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408 (1989). The District Court applied that test and concluded that, with respect to the tribal lands taken under the Cheyenne River Act and nontribal lands taken under the Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887, the Tribe's political integrity, economic security, or health or welfare was not imperiled by the lack of such authority. Should the Court of Appeals' conclusion concerning the existence of a treaty-secured regulatory right and that right's nonabrogation be reversed, the District Court's findings are determinative even if, under *Brendale*, the latter court should have first inquired into whether the affected tribal interests were subject to protection only through nontribal administrative or judicial proceedings. However, if the Court of Appeals' analysis as to the existence and nonabrogation of a treaty-conferred regulatory power is sustained, its remand order with respect to the nonmember land taken under the Flood Control Act raises the issue whether inherent tribal authority can serve as a basis for regulating non-Indian

hunting and fishing on those lands. This is an important and unresolved question.

ARGUMENT

1. The Fort Laramie Treaty of April 29, 1868, 15 Stat. 635 (1869), created a reservation for various tribes of the Sioux Indians, including the Cheyenne River Sioux Tribe. The reservation was for "the absolute and undisturbed use and occupation" of the tribes and, except for federal employees or agents and certain other designated persons, no non-Indians were "ever [to] be permitted to pass over, settle upon, or reside" within the reservation. *Id.* at 636. The Court recognized in *Montana v. United States*, 450 U.S. 544 (1981), that the identically-worded territorial exclusivity provision in the Fort Laramie Treaty of May 7, 1868, 15 Stat. 649 (1869), accorded the Crow Tribe "implicitly[] the power to exclude others from [its reservation]" and "*arguably* conferred upon [it] the authority to control fishing and hunting on those lands." *Id.* at 554, 558 (emphasis supplied). The Court of Appeals construed the latter statement in *Montana* as establishing that the Sioux treaty "granted the Tribe an exclusive right to control hunting and fishing on the Reservation" -- a right which it would find abrogated only if "Congress clearly expressed an intent to divest the Tribe of [such] regulatory authority[.]" *South Dakota v. Bourland*, 949 F.2d 984, 991 (8th Cir. 1991) (App. A-24, A-27).

The Court of Appeals' reasoning raises important issues. The Fort Laramie Treaty did not expressly grant the Tribe regulatory authority over persons who were otherwise properly within the Cheyenne River Sioux

Reservation; it instead set aside an area within which the Tribe's members could reside and, federally-imposed restraints aside, be governed by tribal law or customs. The Court's analysis can thus be accepted only if a general right to regulate non-Indian[1] conduct within the Reservation is implied from the right to exclude. The Court of Appeals' reliance on *Montana* for the proposition that an implied regulatory right exists under the Treaty ignores this Court's careful use of the term "arguably." While the power to exclude may be a necessary corollary to territorial exclusivity, the right to regulate persons lawfully within a reservation is not. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982) ("We are not persuaded by the dissent's attempt to limit an Indian tribe's authority to tax non-Indians by asserting that its only source is the tribe's power to exclude such persons from tribal lands. Limiting the tribes' authority to tax in this matter contradicts the conception that Indian tribes are domestic, dependent nations, as well as the common understanding that the sovereign taxing power is a tool for raising revenue necessary to cover the costs of government"). The treaty-abrogation decisions the Court of Appeals relied upon, finally, involved specific, textually-rooted rights. *United States v. Dion*, 476 U.S. 738 (1986) (partial abrogation of the treaty right to hunt by the Eagle

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[1]The Court of Appeals addressed only the issue whether the Tribe possessed authority to regulate non-Indian hunting and fishing, having concluded that the question of tribal authority over such activity by nonmember Indians had not been raised in the petitioner's amended complaint or tried below. 949 F.2d at 989-90 (App. A-19 - A-20). The correctness of the Court of Appeals' determination in this respect is not presented by the petition. It still bears mention that this Court has repeatedly treated non-Indians and nonmember Indians as similarly situated for purposes of determining the reach of tribal jurisdiction. *E.g., Duro v. Reina*, 110 S. Ct. 2053, 2060-61 (1990); *Rice v. Rehner*, 463 U.S. 713, 722 (1983); *Washington v. Confederated Tribes of Colville Indian Res.*, 447 U.S. 134, 161 (1980).

Protection Act); *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979) (treaty fishing right not abrogated by international convention); *Menominee Tribe v. United States*, 391 U.S. 404 (1968) (treaty hunting and fishing rights not abrogated by tribal termination act).

The Court of Appeals' implication of a treaty-secured right to regulate has far-reaching implications. First, the regulatory right would not be limited to hunting and fishing activity but would encompass all forms of civil regulation of non-Indian conduct occurring on the Reservation. The Tribe's regulatory power, if the Court of Appeals' reasoning is credited, thus logically extends to other matters such as imposing fees for recreational use of the Oahe Reservoir or requiring safe boating practices. Second, if the involved regulatory power is positively conferred by the Treaty, questions arise over whether such power, in view of its federally-delegated nature, must be exercised consistently with, *inter alia*, the due process constraints of the Fifth Amendment. *Cf. Duro*, 110 S. Ct. at 2064 ("[o]ur cases suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right"); *United States v. Wheeler*, 435 U.S. 313, 328 n.28 (1978) (leaving open the "interesting question" whether "a tribe which was deprived of [the sovereign power to prosecute its members] by statute or treaty and then regained it by statute or treaty would necessarily be an arm of the Federal Government"). The lower court's uncritical implication of an implied right to regulate on the basis of the territorial exclusivity provision in the Fort Laramie Treaty raises an important question which should be reviewed.

2. Even if the Court of Appeals properly implied a right under the Fort Laramie Treaty to regulate non-Indian hunting and fishing, its abrogation analysis represents an unusual, if not a wholly idiosyncratic, reading of *Montana*. While the latter decision did observe in a footnote that allotment-era statutes could not be viewed as supporting the existence of tribal regulatory jurisdiction over non-Indian hunting and fishing on non-Indian fee lands (450 U.S. at 559 n.9), the Court stated more broadly in the text that the Crow Tribe's arguable hunting and fishing regulatory power "could only extend to land on which the Tribe exercises 'absolute and undisturbed use and occupation[]'" (*id.* at 559). Nothing in *Montana* remotely suggested that, for purposes of determining whether a regulatory right implied from the promise of territorial exclusivity has been abrogated, a clear intention to abrogate the implied right must appear in the legislation or legislative history abrogating the territorial exclusivity entitlement itself. Since the Cheyenne River Sioux Tribe no longer possesses the power to exclude nonmembers from land taken under the Cheyenne River Act, Pub. L. No. 83-776, 68 Stat. 1191 (1954), "that power can no longer serve as the basis for tribal exercise of the lesser included power[.]" *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 424 (1989) (White, J.). Indeed, the Court's resolution of the streambed ownership issue with respect to the Big Horn River in *Montana* was relevant to the general regulatory issue presented only because the United States and the Crow Tribe sought "to establish part of their claim of power to control hunting and fishing on the reservation by asking us to recognize their title to the bed of the Big Horn River." 450 U.S. at 550; *see also Brendale*, 492 U.S. at 443 (Stevens, J.) (in *Montana* "we held that the State owned the bed of the Big Horn River and thus rejected the Tribe's contention that it was entitled to regulate fishing

and duck hunting in the river based on its purported ownership interest"). It makes no sense to read *Montana* as leaving open the question whether the Crow Tribe could regulate nonmember hunting and fishing on the Big Horn River in view of the Court's rejecting the very predicate for the assertion of tribal authority, even though Montana's title to the streambed was derived from Equal Footing Doctrine principles and not from an allotment-era statute.

The Court of Appeals' treatment of *Montana* has more than mere academic importance. Modern Indian reservations contain large amounts of land which passed out of tribal ownership other than through the General Allotment Act, 24 Stat. 388 (1887) (*codified as amended at* 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354), and related statutes. In the State of Montana, for example, the federally-owned Yellowtail Dam and Reservoir is located within the Crow Reservation on lands purchased in accordance with Senate Joint Resolution No. 12, Pub. L. No. 85-523, 72 Stat. 361 (1958), and the State, together with the federal government, regulates activities on the reservoir. The joint resolution cannot be said to have the destruction of tribal government as its goal. Montana additionally was conveyed sections 16 and 36 of lands within four of its seven Indian reservations for school purposes in allotment-era statutes, but it is equally difficult to conclude that such conveyances were for the purpose of destroying the affected tribes' governmental structure rather than for the purpose of fostering education of reservation children. *See* Act of March 1, 1907, 34 Stat. 1015, 1035 (Blackfeet Reservation); Act of June 4, 1920, 41 Stat. 751, 756-57 (Crow Reservation); Act of April 23, 1904, 33 Stat. 302, 303-04 (Flathead Reservation); Act of May 30, 1908, 35 Stat. 558, 561 (Fort Peck Reservation). The decision below, if followed by other circuits, will result in substantial jurisdictional confusion and conflict.

3. Finding no treaty-right abrogation, the Court of Appeals did not address the issue whether the Tribe's inherent authority could serve as a basis for the exercise of regulatory jurisdiction over non-Indian hunting and fishing within the 100,000 acres of land taken under the Cheyenne River Act. It did discuss that issue, however, in connection with the 18,000 acres of land taken from nonmembers pursuant to the Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887. 949 F.2d at 995 (App. A-43 - A-46). With respect to the latter taken lands, the court relied on the District Court's finding that they were in an "open" area of the Reservation and stated that "the analysis used by Justice White in his plurality opinion in *Brendale* should be applied to this acreage" -- an analysis which it deemed to require application of both *Montana* exceptions. *Id.* (App. A-45 - A-46). The court remanded the case for such analysis since, while the District Court had concluded neither exception was applicable, it had done so without differentiating between areas taken under the Flood Control Act and those taken under the Cheyenne River Act.

The *amici* States believe the Court of Appeals misconstrued Justice White's plurality opinion in *Brendale*. Rather than determining that the tribes there conceivably had a right to exercise zoning authority over any of the nonmember-owned lands at issue, the plurality opinion held the opposite. It noted the use of the term "may" in the formulation of the second *Montana* exception -- a use which "indicates to us that a tribe's authority need not extend to all conduct that 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe,' but instead depends on the circumstances." 492 U.S. at 429. It further remarked "that a literal application of the second exception would make little sense in the circumstances of

these cases" because "[t]o hold that the Tribe has authority to zone fee land when the activity on that land has the specified effect on Indian properties would mean that the authority would last only so long as the threatening use continued." *Id.* at 429-30. "*Montana*," the plurality opinion then stated,

> should therefore not be understood to vest zoning authority in the tribe when fee land is used in certain ways. The governing principle is that the tribe has no authority itself, by way of tribal ordinance or actions in tribal courts, to regulate the use of fee land. The inquiry thus becomes whether, and to what extent, the tribe has a protectible interest in what activities are taking place on fee land within the reservation and, if it has such an interest, how it may be protected. ... [¶] Since the tribes' protectible interest is one arising under federal law, the Supremacy Clause requires state and local governments ... to recognize and respect that interest in the course of their activities. The Tribe in this case, as it should have, first appeared in the county zoning proceedings, but its submission should have been, not that the county was without zoning authority over fee land within the reservation, but that its tribal interests were imperiled. The federal courts had jurisdiction to entertain the Tribe's suit for declaratory and injunctive relief, but given that the county has jurisdiction to zone fee lands on the reservation and would be enjoinable only if it failed to respect the rights of the Tribe under federal law, the proper course for the District Court in the Brendale phase of this case would have been to stay its hand until the zoning proceedings had been completed. At that time, a judgment could be made as to whether the uses

> that were actually authorized on Brendale's property imperiled the political integrity, the economic security, or the health or welfare of the Tribe.

Id. at 430-31 (footnote omitted). Although the *Brendale* plurality opinion does not entirely foreclose use of the second *Montana* exception as a basis for the exercise of inherent tribal authority over nonmembers in a civil regulatory context, it is difficult to envision a situation where use of such authority, as opposed to invocation of nontribal administrative or judicial procedures, would be appropriate.

Whether the Court of Appeals' interpretation of *Brendale* is correct need be considered only if its treaty-abrogation analysis with respect to the tribal lands taken under the Cheyenne River Act is accepted. The District Court's findings established unequivocally that no impairment of the Tribe's political integrity, economic security, or health or welfare had arisen by virtue of non-Indian hunting on all taken lands.[2] However, should the

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[2]The District Court's findings after trial concerning the second *Montana* exception were quite extensive. In part the court determined: (1) "[I]t does not appear that subsistence hunting and fishing is widely practiced by present Cheyenne River Sioux Indians" (App. A-75); (2) "[t]ribal regulation of nonmember hunting on the taken area and nonmember fee lands is not necessary to protect hunting by tribal members for subsistence purposes" (*id.*); (3) "[t]he past subsistence needs of tribal members have been met despite nonmember hunting on the taken area and fee lands" (App. A-77); (4) "[t]ribal regulation of nonmember fishing on the shoreline of the taken area is not necessary to protect fishing by tribal members for subsistence purposes" (*id.*); (5) "[g]enerally nonmembers hunting and fishing on the reservation have conducted themselves in a manner that does not threaten legitimate tribal concerns for livestock" (App. A-78); and (6) "[i]n sum, the Tribe need not regulate the hunting and fishing activities of nonmembers on the taken area and

(continued...)

treaty-abrogation analysis below be upheld, the propriety of the remand order becomes material, and it is unclear how exercise of tribal regulatory jurisdiction over the nonmember lands taken under the Flood Control Act would be any more practical than the exercise of tribal zoning authority in *Brendale*. Here, as there, tribal authority would at most be coextensive with those activities which "imperil" a "protectible interest" and would "last only so long as the threatening use continued."[3] The Court of Appeals' decision thus may afford an opportunity to clarify whether the second *Montana* exception has other than *de minimis* viability as justification for the assertion of inherent tribal regulatory authority and, if it does, to explore those factors relevant to determining when such authority is present.

(...continued)

the nonmember fee lands to protect its political integrity, economic security, or health or welfare" (App. A-89). The District Court did not make any findings concerning the consensual-relationship exception, but no consent to tribal regulation appears to have existed.

[3]What constitutes the Tribe's protectible interest under present circumstances is less than certain. The initial alienation of the lands eventually taken from nonmembers under the Flood Control Act presumably vitiated any absolute entitlement to hunt or fish on those lands or any right to a specific share of the game or fish harvested therefrom.

CONCLUSION

The *amici* States respectfully request that the petition for writ of certiorari be granted.

Respectfully submitted,

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